



Internet Email: opd@opd.wa.gov

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE

(360) 586-3164
FAX (360) 586-8165

March 30, 2009

The Honorable Justice Charles W. Johnson
Associate Chief Justice
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

RE: Comment on proposed changes to CrR 3.1, CrRLJ 3.1, and JuCR 9.2

Dear Justice Johnson,

The Office of Public Defense (OPD) supports the proposed changes to CrR 3.1, CrRLJ 3.1, and JuCR 9.2. Requiring appointing judges to consider attorneys' compliance with the Washington State Bar Association (WSBA) Standards for Indigent Defense Services would improve public defense quality problems in various Washington jurisdictions.

OPD released the 2008 Status Report on Public Defense in Washington State a few days ago. The report describes the current types of public defense oversight in Washington's counties. In the 11 counties with a government agency or non-profit public defender office, attorney experience is generally not a problem, as a managing attorney ensures that the appointed attorney has appropriate experience and supervision. Similarly, in five counties with indigent defense coordinators, attorney experience is generally not a problem, as the coordinator serves a similar management function. The rule change would have the most impact in the remaining 23 counties that lack formal attorney oversight. Though RCW 10.101.030 requires counties and cities to establish public defense standards, numerous counties have not yet done so, and many of the existing ordinances are vague regarding certain standards.

OPD suggests that should the Court decide not to adopt the full suggested rule change, a modified rule change be considered. This proposal would require that judges ensure that attorneys they appoint have the professional experience required under WSBA Standard 14, "Qualifications of Attorneys."

At the appointment stage of a criminal case involving an indigent defendant, the judge is uniquely able to ensure that a proposed public defense attorney has at least the minimum expertise in criminal cases. In fact, in every case in which the right to counsel attaches, the judge is ultimately responsible for resolving appointment questions and appointing counsel, as provided by Chapter 10.101 RCW and by the Criminal Rules for Superior Court, the Juvenile Court Rules, and the Criminal Rules for the Courts of Limited Jurisdiction.¹

¹ Chapter 10.101 RCW charges courts with the responsibility of determining the defendant's indigency status before appointing counsel; this determination is delegated to county indigency screeners in 13 counties, and is handled directly by the judge in the remaining counties. See "Update on Criteria and Standards for Determining and Verifying Indigency, Oct. 2007, www.opd.wa.gov at 3. Many court rules govern discretionary decisions that judges make pertaining to the appointment of counsel. See, e.g., CrR 4.1(d) & CrRLJ 4.1(c) (requiring the judge to ascertain at arraignment that a defendant's waiver of counsel is made voluntarily); CrR 4.2(g) & JuCR 7.7 (requiring



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In the absence of judicial review of attorneys' professional qualifications prior to their appointment, attorneys without the requisite experience will continue to be appointed in some jurisdictions. For example, last year the Court of Appeals reversed a murder conviction in an Asotin County case in which an appointed attorney had never had a felony trial and told the court she lacked sufficient experience, but was appointed anyway. *State v. Wilson*, 144 Wn. App. 168 (2008). In other counties, attorneys with little experience are sometimes appointed for juvenile offender or adult felony matters. The adoption of a qualifications requirement implementing the judicial screening of attorneys before appointment would be a significant step toward adequate oversight of public defense in Washington.

In order to simplify judicial administration of such a screening requirement, OPD has prepared the enclosed suggested attorney qualifications documentation form. The form elicits Standard 14 professional qualifications information from the proposed public defense attorney, who signs the form under penalty of perjury. Attorneys in the 16 counties with public defender offices or indigent defense coordinator oversight systems would only need to state that fact on the form. It is anticipated that a proposed attorney would complete the form prior to appearing before the court for initial appointment.

Because the form for the most part elicits only qualifications information and tracks Standard 14, and the attorneys themselves would be required to fill out the form, the amount of judicial time expended in screening would be minimal. Public defense attorneys who regularly appear in the court would be screened once for qualifications for each category of case for which they seek appointment; their processed documentation form would be filed with the court, following the common practice for interpreter qualifications screenings in many courts.

OPD feels that either the proposed rule change, or the alternative qualifications screening rule would improve indigent defense representation in Washington. Because public defense problems remain pervasive and deep, addressing them effectively requires multi-faceted reform actions by all branches of government. The judicial branch has been vigilant in securing funding for public defense representation over the past few years. Judicial oversight of the appointment process naturally complements and strengthens these efforts. For these reasons, OPD requests that changes be made to CrR 3.1, CrRLJ 3.1, and JuCr 9.2.

Sincerely,


Joanne Moore
Director

JM:JJ
Enclosure

that a defendant and juvenile guilty plea statement must assert to the judge's satisfaction that the defendant or juvenile understands he or she has the right to counsel and that counsel will be provided at public expense if he or she is indigent); JuCR 9.2(d) ("The court shall provide a lawyer at public expense in a juvenile offense proceeding" when required by statute); CrRLJ 4.1(a)(3) (mandating that the judge advise the defendant on the record of the right to "be represented by a lawyer at arraignment and to have an appointed lawyer for arraignment if the defendant cannot afford one").

**Attorney documentation regarding the attorney's proficiency,
ability, and commitment appropriate to the proceedings
pursuant to CrR 3.1, CrRLJ 3.1, and JuCR 9.2**

Each attorney representing indigent defendants in this court shall complete this questionnaire and submit it to the court prior to the attorney's initial appointment. Once the court determines an attorney to be qualified pursuant to CrR 3.1, CrRLJ 3.1 or JuCR 9.2, the court may presume the attorney qualified whenever the attorney appears before the court on similar matters. The attorney shall notify the court in writing of any change in status that could impact the attorney's qualifications.

Attorney name: _____ Washington State Bar Association number: _____

Business address and telephone: _____

1. Are you a full-time employee in good standing of a county or city public defense agency operating in compliance with Chapter 10.101 RCW? ____ Yes ____ No

If yes, name the agency director, and stop here. _____

2. Are you a full-time employee in good standing of a private nonprofit agency that contracts exclusively with a county or city to provide indigent defense services in compliance with Chapter 10.101 RCW? ____ Yes ____ No

If yes, name the nonprofit director, and stop here. _____

3. Are you a private contractor for a county or city that employs an attorney to coordinate, manage, supervise and enforce contracts for indigent defense services in compliance with Chapter 10.101 RCW? ____ Yes ____ No

If yes, name the coordinator and stop here. _____

4. Are you list-appointed and/or a private contractor for a county or city that does not employ an attorney to coordinate, manage, supervise and enforce contracts? ____ Yes ____ No

5. If you are list-appointed and/or a private contractor for a county or city that does not employ an attorney to coordinate, manage, supervise and enforce contracts, please complete the following questions regarding your criminal defense qualifications:

- a. Do you satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court? ____ Yes ____ No
- b. Are you familiar with the statutes, court rules, constitutional provisions, and case law relevant to practice in this court? ____ Yes ____ No
- c. Are you familiar with collateral consequences of convictions, mental health issues and obtaining expert services? ____ Yes ____ No
- d. Do you complete seven hours of continuing legal education within each calendar year in courses relating to criminal defense practice? ____ Yes ____ No

- e. For adult or juvenile misdemeanor appointments:
- i. Did you answer "yes" to each question 5(a) through 5(d) above? ____ Yes ____ No
- f. For adult felony appointments:
- i. Class A felonies: Have you served at least two years as a prosecutor, public defender, or private criminal defense lawyer, and have you been trial counsel alone or with co-counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury? ____ Yes ____ No
- ii. Class B felonies – violent or sexual offenses: Have you served at least one year as a prosecutor, public defender, or private criminal defense lawyer, and have you been trial counsel alone or with co-counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury? ____ Yes ____ No
- iii. All other Class B felonies, Class C felonies, and probation revocation: Have you served at least one year as a prosecutor, public defender, or private criminal defense lawyer, and have you been trial counsel alone or with co-counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury? ____ Yes ____ No
- g. *For juvenile criminal appointments:*
- i. Class A felonies: Have you served at least one year as a prosecutor, public defender, or private criminal defense lawyer, and have you been trial counsel alone in five Class B and Class C felony trials? ____ Yes ____ No
- ii. Class B and Class C felonies: Have you served at least one year as a prosecutor, public defender, or private criminal defense lawyer, and have you been trial counsel alone in five misdemeanor cases brought to final resolution? ____ Yes ____ No

DECLARATION: I certify under penalty of perjury under Washington State law that the above is true and correct.

Signature

Date

COURT DETERMINATION

THE ATTORNEY'S ANSWERS ABOVE INDICATE THAT THE ATTORNEY MEETS THE REQUIREMENTS OF CrR 3.1, CrRLJ 3.1 OR JuCR 9.2 FOR THE FOLLOWING PROCEEDINGS:

- ____ Class A Felonies
- ____ Class B Felonies, Violent or Sexual Offense
- ____ Class B Felonies, Class C Felonies, or Probation Violation
- ____ Misdemeanors
- ____ Juvenile Class C Felonies
- ____ Juvenile Class B and Class C Felonies
- ____ Juvenile Misdemeanors